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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC. AND MARGARET BROTHERTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Postmaster General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on December 16, 1954.

OPINIONS BELOW

The opinions in the Court of Appeals are not yet reported but are reproduced in the Appendix, *infra*, pp. 1A-21A. The District Court issued no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1954 (Appendix, *infra*, pp. 21A-22A). By order of the Chief Justice dated March 12, 1955, the time for filing a petition for a writ of certiorari was extended to and including March 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the civil mail obscenity statute (39 U.S.C. 259a) is limited to mail relating to particular matter which has been specifically found to be obscene, or whether it applies to all mail addressed to a person found to be a vendor of obscenity such as the publisher of a magazine several past issues of which have been determined to be obscene.

2. Whether the court below erred in declining to consider and resolve the question of the validity of the particular administrative determination of obscenity before proceeding to broad questions, which may not have been necessary to decision, of the possible constitutional invalidity and general scope of 39 U.S.C. 259a.

STATUTE INVOLVED

The Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U.S.C. 259a, provides:

> upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the

mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partner-

ship, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes.

STATEMENT

Respondents brought this action to enjoin the Postmaster General from enforcing his Orders Nos. 55219 and 55220, issued pursuant to a determination, made after hearing, that the magazines published by respondents were obscene within the meaning of the Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U.S.C. 259a, *supra*. These orders direct the appropriate local postmasters to intercept all mail addressed to respondents, stamp it "Unlawful," and return it to the sender. The local postmasters were also directed to refuse to pay any money orders addressed to respondents (J.A. 38-40).[1]

These orders resulted from the following proceedings: On September 23, 1952, and December 4, 1952, the Solicitor for the Post Office Department filed with the Chief Hearing Examiner of that Department administrative complaints against respondents (J.A. 13-19). These complaints alleged that the Solicitor "has probable cause to believe that * * * there is being conducted through the mails an enterprise in violation of the provisions of 39 U.S. Code 259a." The complaints further alleged that respondents' magazines contained lewd and obscene photographs of nude men and women

[1] References to "J. A." are to the printed Joint Appendix filed in the Court of Appeals.

and that these magazines were made available to anyone who remitted the subscription price through the mail or paid the purchase price on the newsstands. Respondents filed answers denying the allegations of the complaints (J.A. 20-27), whereupon the Post Office Department gave them due notice of a hearing and held such a hearing on February 16, 1953, at which respondents appeared with counsel (J.A. 28).

At the hearing, copies of the publications in question, 25 different issues of *Sunshine and Health*, 7 different issues of *Sun Magazine*, and 1 issue of *Natural Herald*, were introduced into evidence. (See Original Exhibits filed with the Record.) Respondents admitted all the allegations in the complaints except the charges that the magazines were obscene, lewd, lascivious and indecent; and that respondents were receiving remittances through the mails for the magazines (J.A. 28). The parties filed proposed findings of fact, conclusions of law and supporting reasons, and the hearing examiner rendered his initial decision on March 27, 1953. After finding that the respondents were receiving remittances through the mails for the magazines (J.A. 29), the hearing examiner determined that the magazines were obscene, basing that finding particularly upon unretouched photographs of nude females showing at close range the breasts, buttocks, and pubic areas; and unretouched photographs of men showing the private parts (J.A. 30-32).

Pursuant to the Post Office Department rules of practice, respondents appealed to the Postmaster

General and on June 23, 1953, the Postmaster General found that, because of their photographs, respondents' magazines were obscene by any recognized standard (J.A. 35-37). On that same date, the Postmaster General issued the above-described orders. (J.A. 38-40).

On July 2, 1953, this action was brought in the United States District Court for the District of Columbia seeking a declaratory judgment and an injunction on the grounds that the orders violated the First and Fifth Amendments to the Constitution (J.A. 2-13). Respondents' motion for a preliminary injunction was heard by the District Court on July 13, 1953 (J.A. 75), and the parties stipulated that its determination of that motion would be dispositive of the entire case (J.A. 76). The record before the District Court consisted of the administrative record alone.

Observing that he could see no limit to his power in the case except his own opinion, the district judge stated, "I just do not agree with the Postmaster General and I grant the injunction." (J.A. 88-89). The court's order, filed on July 16, 1953, granted the injunction on the ground that the publications "are not obscene and do not fall within the provisions of 39 U.S.C. 259a" and that the orders of the Postmaster General are invalid (J.A. 90). The court made no finding whether the Postmaster General's determination was arbitrary or capricious or whether there was insufficient evidence to support the order.

The District Court's judgment was appealed

upon the ground that the district judge had unlawfully substituted his judgment for that of the Postmaster General, and that the Postmaster General's determination should have been sustained unless found to be arbitrary or not supported by evidence. The majority of the court below affirmed the District Court's judgment but on entirely different grounds, which are described below.

REASONS FOR GRANTING THE WRIT

1. 39 U.S.C. 259a, *supra*, pp. 2-4, permits the Postmaster General, satisfied by evidence that a vendor of obscenity is obtaining or attempting to obtain money through the mails for his merchandise, to "* * * instruct postmasters * * * to return *all* * * * mail" (emphasis added) addressed to such vendor to the originating post office and thence to the senders, with the word "Unlawful" stamped on the mail matter. Postal money order sums payable to such a vendor would also be returned to the remitters. The statute contemplates an investigation to determine whether a business or course of dealing for the purpose of selling obscenity has been established and, if such a business or course of dealing is shown to exist, an order by the Postmaster General to local postmasters to stop incoming mail to the vendor. On its face, the statute does not envisage inquiries or hearings directed only against past offerings of particular pieces of obscenity. Rather it is the going concern, and "all," not merely part of, the incoming mail to that going concern, which is

reached by the statutory language, words which cover both past and future dealings in the proscribed merchandise.

The majority of the court below refused to accept this as the scope and purpose of 39 U.S.C. 259a. The court felt that "grave constitutional questions" would be raised if the statute be read as authorizing the issuance of orders which reached incoming mail in connection with future issues of respondents' publications. Accordingly, the plain language was limited so as to permit the issuance of orders which halted incoming mail only in connection with *past* issues specifically found to be obscene; to the extent that they went beyond the statute as thus limited, the orders in this case were held bad.[2] This reading of the statute, which we believe to be mistaken, has had the practical effect of nullifying the use of Section 259a by the Post Office Department and of excising it from the body of federal remedies against obscenity.

(a). First, the court's constitutional doubts seem to us to have been unduly magnified.[3] Congress has, in the pattern of statutes into which 39 U.S.C.

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[2] It should be noted that respondents, in the court below, while urging the invalidity of the statute as a prior restraint (see *infra*, p. 11), did not suggest that any variation from the plain language of the statute be adopted by the court, or that the orders issued here be changed or limited.

[3] The opinion below does not discuss at length the court's constitutional difficulties but they appear to revolve around the First Amendment. See the quotation from the opinion of Mr. Justice Douglas in *Stanard* v. *Olesen*, 74 Sup. Ct. 768, 771, and the citations at Appendix, *infra*, pp. 7A, 13A).

259a fits, vested unusual powers in the Postmaster General and this court has upheld that authority. It is against this background that 39 U.S.C. 259a. should be viewed. That statute is substantially identical with 39 U.S.C. 259 (Appendix, *infra*, pp. 23A-24A), the law which contains the Postmaster General's power to act in connection with fraudulent enterprises, lotteries, and similar matters. In turn, the statute now embodied in 39 U.S.C. 259 has been substantially unchanged since its first enactment in 1872. 17 Stat. 322. This legislation has been challenged on several constitutional grounds (including those which appear to trouble the court below) and its validity has been sustained. *Donaldson* v. *Read Magazine*, 333 U.S. 178; *Public Clearing House* v. *Coyne*, 194 U.S. 497.

Giving to 39 U.S.C. 259a the same broad scope as its prototype statutes, we submit that the constitutional validity of the plain language and purpose of the Section, and the orders issued under it in this case, is supported by the *Read Magazine* and *Public Clearing House* decisions. In the former, this Court sustained the fraud order statute and the Postmaster General's interpretation of that statute on all fours with the construction embodied in the orders in the instant case, against contentions that either or both violated the First, Fourth, Fifth, Sixth or Eighth Amendments. 333 U.S. at 189-191. The order there upheld was not limited to incoming mail relating to *past* issues of the magazine. In fact, the magazine company expressly urged that the order, if applicable in the future, was a prior

restraint. Brief for Respondents in Answer to Questions Propounded by the Court, October Term, 1947, No. 50, p. 50. In sustaining the order against this and similiar contentions, this Court said that its "future effect is merely to enjoin the continuation of conduct found fraudulent." 333 U.S. at 191. By necessary implication the *Read Magazine* case would seem to validate the present orders in reaching incoming mail with regard to future as well as past issues of respondents' publications. See, also, *Public Clearing House* v. *Coyne*, 194 U.S. 497, 510 (quoted in the dissenting opinion below).

Passing the actual decision in *Read Magazine*, the court below sought to place reliance on the special circumstances preceding final submission of that case to this Court. The enterprise there involved was large and complex and the fraudulent activity constituted a small feature of the total business. The Postmaster General's orders, as originally drafted, served to cut off the entire incoming mail to the enterprise and its staff. As modified after the original argument in this Court, the order forbade delivery of incoming mail only to that department which was conducting the fraudulent contest. It was this modified order which was sustained.

There is no problem comparable to that originally posed in *Read Magazine* with respect to the breadth of the orders in this case. Here, the whole magazines have been found to be obscene and therefore "unlawful." As was admitted by respondents, the photographs of nudes found to be obscene form an

indispensable part of all issues, and all issues relate almost exclusively to nudist activities. A large number of past issues were specifically found to be obscene (*supra*, p. 5). Therefore, unlike the *Read Magazine* case, no "lawful" (*i.e.*, not connected with the use of obscene material) activity of respondents is being reached along with the unlawful activities. Thus, the dissimilar circumstances of the modification of the order in the *Read Magazine* case should not have moved the court below to curtail the scope of the statute involved here and the orders properly issued thereunder. Rather, the court should have sustained the validity of the statute, if that issue had to be reached, and should have seen both the statute and this Court's prior decisions as justifying the impact of the orders with regard to both past and future mail coming to respondents.[4]

(b). Nevertheless, the court required that all orders issued under Section 259a be effective to halt delivery only of mail relating to particular issues of periodicals already published and found to be ob-

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[4] We do not discuss the other constitutional objections made by respondents in their brief below because the Court of Appeals made no mention of any of them; we wish, however, to reserve the right to meet those arguments in our brief should certiorari be granted. In our opinion, those constitutional objections to the statute have previously been resolved against the position of respondents in a series of cases, including, *inter alia*, *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407; *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288; *Rosen* v. *United States*, 161 U.S. 29; *In re Rapier*, 143 U.S. 110; *Ex parte Jackson*, 96 U.S. 727; *United States* v. *Rebhuhn* 109 F. 2d 512 (C.A. 2), certiorari denied, 310 U.S. 629; *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385 (C.A. 6).

scene; mail relating to future publications was not to be stopped. After imposing this limitation upon the statute, the opinion then purports to permit amendment of the Postmaster General's orders to comply with the limitation, but, as the majority itself seems to have recognized, this would be impossible. The opinion states (App., *infra*, p. 12A), "Whether such limitation is practically possible, in cases like the present, is not for this court to determine." It is plain, however, that the court's limitation of the statute would render it unenforceable against any periodical and probably unenforceable against most obscene matter.

Existing statutes make it unlawful for the Postmaster General or local postmasters to open any first class mail not addressed to them.[5] It is therefore clear that, under the interpretation given below to Section 259a, *no* mail addressed to respondents or to the publishers of any other periodicals found to be obscene could be intercepted and returned to the sender as the statute clearly directs, for certainly no postmaster could determine from examination of the outside of an envelope whether the contents relate to future or past issues of the publication.

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[5] 18 U.S.C. 1703; 18 U.S.C. 1717(c). It will be noted that 39 U.S.C. 259 contains an express disclaimer of any authorization to open mail for purposes of enforcing that Act whereas Section 259a contains no such disclaimer. However, the Postmaster General has not interpreted this difference as impliedly superseding prior legislation and giving broad powers of inspection over all mail, in order to enforce the obscenity statute.

If the decision below forbade the enforcement of 39 U.S.C. 259a only against magazines or other regularly published periodicals, it would have been sufficiently disruptive of the functions of the Post Office Department to warrant this petition for certiorari. But the effect of the decision is even broader than that. By its terms, the ruling would apply to any periodic mailings of photographs or other printed matter that could conceivably be brought within the penumbra of the First Amendment. And if the decision be construed as based on the Fifth and Sixth Amendments, as well as on the First,[6] then it would apply to *any* articles, matters or things—even those not normally protected by First Amendment rights—which are mailed out at intervals. It is already current practice for some dealers in indecent pictures and pamphlets to solicit remittances for periodically issued series of nude photographs or films and to include with each shipment a subscription form or order blank for future issues of similar pictures. If the decision of the Court of Appeals were to become law the Postmaster General would be helpless to prevent this dissemination of obscene matter since he could not effectively prevent the continuous influx of orders to dealers in these materials, as Congress has authorized and directed him to do.[7]

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[6] See fn. 4, *supra*, p. 11.

[7] Some impression of the magnitude of the problem posed by mailings of obscene matter can be gained from the fact that during the first six months of the fiscal year 1955 the Post Office Department made approximately 1220 administra-

Congress has on numerous occasions expressed its desire to prevent use of the mails for transmission of obscene matter and has currently provided three sanctions to discourage that transmission: (a) criminal penalties (18 U.S.C. 1461); (b) nonmailability of matter found to be obscene (18 U.S.C. 1461); and (c) withdrawal of postal services for delivery of mail *to* senders of obscene matter (39 U.S.C. 259a). The first of these sanctions has thus far proved to be largely ineffective because the burden of proof upon the Government is quite properly heavy, fines are often too small to discourage large-scale operators, and criminal proceedings necessarily take time during which much obscene mailings continue, thus frustrating the basic aim of preventing the use of the mails for distribution of such materials. The second sanction is easily avoided by using first class mail which is not subject to inspection by postal authorities.[8] Without inspection, postmasters are powerless to bar the mails since there is no practicable way of detecting the presence of obscene matter. The third sanction, involved in this case, was enacted by Congress in 1950 at the special request of the Postmaster General in order to counterbalance the inadequacies

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tive rulings under 39 U.S.C. 259a. Of that number, approximately 75% were rulings of obscenity. These figures represent a 72% increase over the first six months of fiscal year 1954.

[8] Although first class mail is generally far too expensive for the usual periodical, in the case of obscene magazines, photographs, and pamphlets, the price charged normally is, or can be, high enough to defray the higher postage rates.

of the other statutes. H. Rept. No. 2335, 81st Cong., 2d Sess. The decision of the court below effectively nullifies this considered congressional action.

It is entirely reasonable, as well as constitutional, for the Postmaster General to enforce the statute as it was written and as Congress intended. In this particular case, it is certainly not unreasonable to assume, on the basis of a consistent pattern of past behavior, that respondents' magazines will continue to print unretouched photographs of nude adults showing their private parts and areas. Respondents insist that such photographs are essential to their magazines. If, however, it should be decided to change the character of the magazines, respondents are always free to apply for a new ruling by the Postmaster General.[9] If assumptions based upon a course of past conduct could not be made, there would be no way of enforcing this kind of statute and no really effective means of preventing the flow of obscene matter through the mails, short of permitting postal inspection of all mail—a prohibitively expensive and obviously undesirable practice.

2. This Court has repeatedly held that federal courts should avoid unnecessarily broad decisions, particularly on constitutional questions, unless the resolution of such issues cannot be avoided in dis-

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[9] See, for example, Section 51.28, Post Office Department Rules, 12 Fed. Reg. 7942-7944, providing for revocation and modification of fraud orders upon affidavit that the enterprise against which the order was directed is no longer being conducted.

posing of the case. *United States* v. *Guy W. Capps, Inc.*, 348 U.S. 296; *United States* v. *Harriss*, 347 U.S. 612, 627; *United States* v. *Rumely*, 345 U.S. 41; *Alma Motor Co.* v. *Timkin-Detroit Axle Co.*, 329 U.S. 129. It might appear, superficially, that the court below acted in compliance with this rule. In our view, the opinion makes a mistaken invocation of the rule. The court should here have reached and decided the relatively narrow question brought before it by the appeal, namely, whether there was substantial evidence in the administrative record to support the Postmaster General's finding of obscenity in this particular case [10] or whether the district court was justified in substituting its own judgment for that of the Postmaster General (*supra*, p. 6) and in finding respondents' magazines not obscene.[11] The majority of the court declined to consider this issue but instead concerned itself

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[10] It is established that under 39 U.S.C. 259, the Postmaster General's decision may not be overturned unless there is no substantial evidence to support it or unless it was not fairly arrived at. *Leach* v. *Carlile*, 258 U.S. 138; *Bates & Guild Co.* v. *Payne*, 194 U.S. 106; *Farley* v. *Simmons*, 99 F. 2d 343 (C.A. D.C.), certiorari denied, 305 U.S. 651.

[11] The dissenting judge expressed the belief that the Postmaster General was correct in finding the photographs to be obscene, and other issues of these same magazines have, in two other judicial proceedings, been found to be obscene. *Sunshine Book Co.* v. *Summerfield*, D.D.C., Civil No. 74-55 (decided February 16, 1955); *Sunshine Book Co.* v. *McCaffrey*, 112 N.Y.S. 2d 476 (Sup. Ct. N.Y. Co., 1952). However, it was open to the Court of Appeals to decide otherwise and to affirm the District Court on that ground, and, had it done so, the constitutional and broad statutory issues would never have been reached.

with the far more serious questions of the general reach of Section 259a in all cases and whether "grave constitutional questions" exist if the statute is read as we contend it must be. If the court had followed the normal tradition, it would have decided the administrative question first and may then have been able to leave open the more important general questions for future resolution. This broad, far-reaching and, we think, erroneous decision virtually nullifying Section 259a might have been avoided had the court met first things first. Cf. *United States* v. *Guy W. Capps, Inc., supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1955.